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No. 02-99

In the Supreme Court of the United States

ALBERTO VALDEZ,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly held that the AEDPA's deference requirements are not void when a federal court conducts its own evidentiary hearing due to alleged defects in state habeas proceedings. Additionally, the procedural posture of this case makes it an inappropriate candidate for review because the Fifth Circuit did not reach the merits of Petitioner's habeas claims but remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Finally, contrary to Petitioner's assertion, there is no circuit split or unsettled and important question of federal law that warrants the Court's attention. *See* SUP. CT. R. 10(a), (c). Accordingly, the Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Alberto Valdez murdered a sergeant of the Corpus Christi, Texas Police Department during a traffic stop. On September 9, 1987, Sergeant J.D. Bock was issuing a traffic citation when a large beige car driven by Valdez passed at a high rate of speed. When Valdez failed to stop as directed, Bock returned to his patrol car, turned on the lights and siren, and chased Valdez's vehicle. Bock eventually pulled Valdez over when the beige vehicle blew a tire. Bock's final radio transmission stated that Valdez's vehicle had been stopped.

A witness, Jerry Lee Wittner, had attempted to follow the police car but lost sight of it for approximately 30 seconds. While Wittner was pulling up, Valdez wrestled Sergeant Bock's service revolver away and shot Bock in the chest. Wittner saw Valdez and Bock wrestling, heard the shot, and saw Bock bend over and fall down. Valdez shot Bock again as Wittner ran back to his truck, fired at Wittner as he started to drive away, and then shot Bock twice more. In all, Valdez shot Bock twice in the chest and twice in the head.

After fleeing the scene in his car, Valdez fired on another police officer giving chase. That officer followed Valdez's vehicle down

an isolated country road. Valdez turned into the driveway of a small farmhouse, ran inside, and hid Sergeant Bock's revolver under some couch cushions. Ultimately, police apprehended Valdez lying in a grassy area of a field behind the farmhouse.

At trial, Valdez testified at length about his primary defense: a passenger in his car, unseen by any of the witnesses to the crime and known only as "Chico," shot Sergeant Bock with a .38 special. This lengthy testimony, which provided the jury a first-hand opportunity to hear and observe Valdez, was full of unexplained inconsistencies, and the jury rejected it. Valdez was convicted of capital murder and given a sentence of death in connection with Sergeant Bock's shooting.

The Texas Court of Criminal Appeals affirmed the conviction. *Valdez v. State*, 776 S.W.2d 162 (Tex. Crim. App. 1989) (en banc). In its opinion, the court noted that on the day Valdez murdered Sergeant Bock, Valdez had stolen property in his car and a warrant had issued for his arrest due to violations of parole. *Id.*, at 167.[1] Thus, the court, concluded,

> "it is patently obvious appellant was in the course of a crime spree at the time Officer Bock attempted to stop him. In order to preclude apprehension, appellant killed Officer Bock in a cold-blooded, deliberate manner by shooting him twice in the chest at close range and twice in the head." *Id.*

The court further determined that "[t]he evidence is clearly sufficient to support the inference that appellant was a career criminal who would do anything necessary to avoid apprehension." *Id.*

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1. Valdez had five previous felony convictions. *Valdez*, 776 S.W.2d, at 167.

Valdez filed an application for writ of habeas corpus in state court. He alleged, *inter alia*, that his trial counsel rendered ineffective assistance of counsel by failing to investigate and present certain mitigating evidence—namely evidence of mental retardation—during the punishment stage of the trial. The state court conducted a two-day evidentiary hearing on Valdez's claims, with particular focus on his ineffective-assistance-of-counsel claim. The court heard extensive testimony about trial counsel's performance before and during trial. It also admitted, and heard testimony about, various exhibits Valdez alleged should have alerted trial counsel that Valdez might be mentally retarded.

After two days, the hearing was recessed to permit both parties to secure additional witnesses, if necessary. Approximately six years later, on motion of both parties, the evidence was closed. The court then held another hearing, permitting lengthy oral argument on both sides' proposed findings of fact and conclusions of law. At that hearing, the judge indicated that some of the evidentiary hearing exhibits were missing and that he had not read the transcript of Valdez's trial. He stated, however, that he would reread the transcript of the two-day evidentiary hearing—at which exhibits were discussed and Valdez's trial counsel's performance was dissected.[2]

The state habeas court issued 20 pages of findings of fact and conclusions of law that did not merely "rubberstamp" the State's proposed findings and conclusions, as Valdez misrepresents. Resp.

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2. Specifically, the court stated: "Let's go ahead and—I told you up front that I was not going to give you a ruling today. I want to make sure that I go read this habeas corpus hearing again." Tr. 2/28/97, at 144. Valdez's repeated assertions that the state habeas court "never considered," "admittedly and unapologetically refused to consider," and "effectively excluded from consideration" material evidence distorts the proceedings in that court. *See, e.g.*, Pet. i, 3, 5, 17, 28.

App. 1a-18a.[3] For example, the State proposed 10 findings and conclusions on Valdez's ineffective-assistance-of-counsel-claim; but the court included 20 findings of fact and conclusions of law on this issue. Resp. App. 5a-7a. These addressed matters not included in the State's submission, such as the court's determination that Valdez's trial counsel had asked one of the habeas witnesses to testify during the punishment phase, but she declined; and that the testimony of other character witnesses Valdez presented on habeas corpus review duplicated testimony presented at trial on punishment. Resp. App. 6a.[4]

The Texas Court of Criminal Appeals reviewed the state habeas court's findings of fact and conclusions of law and stated that they were supported by the record. Resp. App. 19a. Therefore, that court denied habeas relief. *Id.*

Valdez then filed his federal habeas corpus petition. The district court granted Valdez an evidentiary hearing on his ineffective-assistance-of-counsel claim, determining that the state habeas hearing had not been full and fair because evidence "was improperly (and, apparently, largely accidentally) excluded by the state habeas judge." Pet. App. 86 n.22. Additionally, the district court stated that, even if Valdez was not "entitled" to a hearing on that basis, "it was proper to exercise its discretion to grant one." Pet. App. 82 n.18.

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3. Citations to Respondent's Appendix will be designated "Resp. App. [page #]" and citations to Petitioner's Appendix will be designated "Pet. App. [page #]."

4. Accordingly, Respondent objects to Valdez's misstatement that "rather than review the evidence, the state habeas court simply signed findings of fact and conclusions of law that repeated virtually verbatim the state's proposed findings and conclusions." Pet. 4.

At the hearing, the district court excluded several of Respondent Cockrell's exhibits offered to refute Valdez's claim that his trial counsel was ineffective for failing to investigate whether Valdez is mentally retarded. These included: the results of a Wechsler Adult Intelligence Scale test that was administered during Valdez's 1974 incarceration with the Texas Youth Commission and revealed a verbal I.Q. of 76, a performance I.Q. of 90, and a full scale I.Q. of 81—scores above the classification of mental retardation; the results of a doctor's examination during that same period of incarceration, in which the doctor concluded Valdez was not mentally deficient; and evidence that Valdez passed an eighth grade equivalency test and four out of five sections of the GED in 1986, two years prior to his conviction for murdering Sergeant Bock. *See* Pet. App. 33, 35-36.

Following the evidentiary hearing, the district court granted Valdez's petition for writ of habeas corpus. The court reasoned that, because it conducted an evidentiary hearing, the deference standards required by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) "largely did not apply." Pet. App. 83-84, 86 n.22. The court independently determined that the writ should issue because Valdez's trial counsel provided ineffective assistance of counsel at the sentencing phase of the trial by failing to make an adequate investigation into Valdez's background. Pet. App. 105.

Respondent Cockrell appealed to the Fifth Circuit, which reversed the district court's judgment. The Fifth Circuit assumed, without deciding, that Valdez had not received a full and fair hearing in state court. The court held, however, that the absence of an adequate state-court hearing is not a prerequisite for applying "the AEDPA's deferential framework, as set out in 28 U.S.C. §2254(d) and (e)(1)." Pet. App. 27, 37.

Rather than evaluate the merits of Valdez's ineffective-assistance-of-counsel claim under the AEDPA, the Fifth Circuit remanded the case to the district court. The opinion made clear

that, on remand, the district court need not disregard evidence from its previous hearing. Rather, that evidence could be used to assist the district court in determining whether, applying the correct deference standards under the AEDPA, Valdez established an ineffective-assistance-of-counsel claim that entitled him to habeas relief.

The Fifth Circuit also held that the district court abused its discretion in excluding evidence of Valdez's Wechsler scores and doctor's examination while incarcerated with the Texas Youth Commission, as well as the results of his GED test and eighth grade equivalency exam. The Fifth Circuit directed the district court, on remand, to admit and consider these records, which "tend to contravene Valdez's contention that he is mentally retarded, which bears on whether his trial counsel's performance prejudiced him." Pet. App. 36-37.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly rejected Valdez's argument that the AEDPA's deference requirements do not apply if a federal court conducts its own evidentiary hearing due to alleged defects in state-court habeas proceedings. The Fifth Circuit's holding properly balances a federal court's decision to conduct an evidentiary hearing with the respect for state-court habeas adjudications required by both the plain text of the AEDPA and this Court's decision in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

Moreover, apart from the correctness of the Fifth Circuit's ruling, the procedural posture of this case renders it an inappropriate candidate for review. The Fifth Circuit did not pass upon the merits of Valdez's ineffective-assistance-of-counsel claim but merely remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Thus, as yet, no lower court has analyzed Valdez's claim under the

AEDPA, and there is no ruling in that respect for this Court to review. Nor, contrary to Valdez's assertion, does the Fifth Circuit's decision implicate a circuit split or an important and unsettled question of federal law that merits attention. *See* SUP. CT. R. 10(a), (c). Finally, the Court should decline to review Valdez's constitutional challenges to the AEDPA, which were not passed upon by the Fifth Circuit and, regardless, are inconsistent with this Court's AEDPA jurisprudence. Accordingly, the Court should deny the petition for writ of certiorari.

ARGUMENT

I. THE PROCEDURAL POSTURE OF THIS CASE RENDERS IT AN INAPPROPRIATE CANDIDATE FOR REVIEW.

Although the Fifth Circuit held that the district court erred in concluding that the AEDPA's deference requirements "largely did not apply" when, as here, there is a federal evidentiary hearing, the Fifth Circuit declined to consider the merits of Valdez's ineffective-assistance-of-counsel claim. Pet. App. 13, 32. Rather, the Fifth Circuit remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Pet. App. 32, 37.

At this time, therefore, no federal court has analyzed whether, for example, the state habeas court's adjudication reflects an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. §2254(d)(1)-(2). Nor has a federal court evaluated whether Valdez provided clear and convincing evidence to rebut the presumption of correctness afforded to all of the state habeas court's factual findings—including facts implicit in mixed law and fact conclusions—and not just the select findings of historical fact to which the district court previously limited its deference. *See id.* §2254(e)(1); *see also* Pet. App. 13-14 & n.11.

Without a lower-court decision on these questions, it would be premature for this Court to address Valdez's complaints about

applying the AEDPA's deferential framework when a federal court conducts its own evidentiary hearing. *See Bhd. of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining, in denying the petition for writ of certiorari, that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) (noting that prudence militates against granting the writ to review a judgment remanding a case for further proceedings).

Valdez erroneously protests that the district court, on remand, will be compelled to disregard the federal record and accept the state court's findings and conclusions—rendering the federal evidentiary hearing a futile exercise. *See, e.g.*, Pet. 26.[5] But the Fifth Circuit's opinion makes clear that its remand is neither driven by that purpose, nor should it have that effect. Rather, the federal evidentiary hearing may, for example, "assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2)." Pet. App. 21. Thus, although a federal evidentiary hearing does not wipe the slate clean and permit a federal court to ignore a state habeas court's two-day evidentiary hearing and issuance of 20 pages of findings of fact and conclusions of law—as Valdez hoped—it can facilitate federal review of the state adjudication underlying a federal petitioner's habeas claims. Consequently, as the Fifth Circuit

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5. Similarly, Valdez's second question presented misleadingly suggests that the Fifth Circuit's decision requires the district court to "disregard its own conclusions" about ineffective assistance of counsel, Pet. i, when, instead, it only precludes the district court from substituting its opinion for that of the state habeas court without first determining if the state court's analysis was unreasonable, as required by the plain text of the AEDPA and this Court's precedent. *See* 28 U.S.C. §2254(d); *Williams*, 529 U.S., at 410-13; *see also infra* Part III.

explained, "[a]n evidentiary hearing is not an exercise in futility just because §§2254(d) and (e)(1) require deference." Pet. App. 21-22.

Regardless, the proper interplay between a federal evidentiary record and the deference requirements in §2254(d) and (e)(1) is best tested through concrete application, not hypothesis. The Court should decline to address Valdez's claims at this procedural juncture. *See Va. Military Inst.*, 508 U.S., at 946; *Bhd. of Locomotive Fireman*, 389 U.S., at 328.

II. No Circuit Split Warrants the Court's Attention.

Although the Fifth Circuit noted its disagreement with *Miller v. Champion*, 161 F.3d 1249, 1254 (CA10 1998)—in which the Tenth Circuit determined it owed no presumption of correctness to factual findings of a state habeas court that did not conduct an evidentiary hearing—there is no circuit conflict that warrants intervention by this Court.[6]

As the Fifth Circuit explained, the Tenth Circuit made no attempt in *Miller* to construe the AEDPA's deference provisions in §2254(d) and (e)(1). Pet. App. 25. Indeed, the Tenth Circuit did not cite, much less analyze, these statutory requirements in its brief deference discussion—even though the court acknowledged, in general, that Miller's claims were governed by the AEDPA. *Miller*, 161 F.3d, at 1252, 1254.[7] Instead, without elaboration, the Tenth

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6. Notably, the state court in *Miller* did not hold an evidentiary hearing before dismissing Miller's ineffective assistance of counsel claim. 163 F.3d, at 1252, 1254. By contrast, the state habeas court in Valdez's case held a two-day evidentiary hearing on Valdez's ineffective assistance of counsel claim. Pet. App. 2, 5.

7. In the portion of the Tenth Circuit's opinion preceding its deference discussion, the court alluded to §2254(d)(1) but erroneously stated that it required a federal habeas petitioner to prove that "his *conviction*"—as opposed to the state habeas court's adjudication of his

Circuit followed its pre-AEDPA precedent, which excused district courts from affording a presumption of correctness to state-court factual findings if a petitioner did not receive an adequate hearing in state court. *Id.* (quoting *Nguyen v. Reynolds*, 131 F.3d 1340, 1359 (CA10 1997)).[8]

The Fifth Circuit correctly noted that *Miller*'s deference conclusion was based solely on pre-AEDPA precedent and, thus, "the Tenth Circuit did not ground its decision on a reading of the statute." Pet. App. 25. The *Miller* opinion, therefore, offers no reasoning to counter the Fifth Circuit's extensive analysis of the AEDPA's text and the manner in which it alters pre-AEDPA deference. As such, *Miller* creates no conflict with the Fifth Circuit.

Tellingly, *Miller* did not address the question of deference to a state court's application of law to fact, *see* 28 U.S.C. §2254(d)(1), or its determination of facts in light of the evidence presented, *see id.*, §2254(d)(2), because—under the pre-AEDPA precedent *Miller* followed—the only deference standard was the presumption of correctness afforded state-court factual findings now paralleled in §2254(e)(1).[9] Thus, the Tenth Circuit never considered how a

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claim—is contrary to, or involved an unreasonable application of, clearly established federal law. *Miller*, 163 F.3d, at 1253 (emphasis added). That misreading of the AEDPA may explain why the Tenth Circuit failed to recognize that §2254(d)(1) requires reassessment of pre-AEDPA deference precedent and why that court did not even cite §2254(d)(1) in the course of its cursory deference discussion. *See id.*, at 1254.

8. Although the Tenth Circuit decided *Nguyen* after the enactment of the AEDPA, the court applied its pre-AEDPA precedent because Nguyen filed his federal habeas petition prior to the Act's effective date. 131 F.3d, at 1345, 1359.

9. The former §2254(d) required that state-court factual findings be afforded a presumption of correctness, subject to enumerated exceptions.

federal evidentiary hearing conducted to cure alleged defects in a state-court proceeding interacts with §2254(d)'s deference requirements.

By contrast, the Fifth Circuit directly addressed this question and logically reasoned that, for example, a federal evidentiary hearing could "assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2)." Pet. App. 21. Nothing in *Miller* engages, much less refutes, the statutory-construction analysis conducted by the Fifth Circuit.[10]

In an unsuccessful attempt to suggest a meaningful disagreement between the Fifth and Tenth Circuits, Valdez cites two post-*Miller* Tenth Circuit decisions that also apply the same pre-AEDPA precedent and state that a presumption of correctness does not apply to state-court factual findings absent an adequate state-court hearing. Pet. 12 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1289 (CA10 2000), and *Barnett v. Hargett*, 174 F.3d 1128, 1135-36 (CA10 1999)). But, like *Miller*, these opinions contain no textual or other discussion or analysis of the AEDPA deference

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Pet. App. 15 (quoting former §2254(d)(6)). The AEDPA replaced that factual presumption of correctness with the current presumption in §2254(e)(1) and also created new deference requirements for questions of law and mixed questions of law and fact in §2254(d). *See* 28 U.S.C. §2254(d), (e)(1); Pet. App. 17-18; *see also infra* Part III (discussing the AEDPA's amendment of §2254).

10. The Seventh Circuit has similarly held that §2254(d)(1)'s "standard is applicable even though the district judge held an evidentiary hearing." *Pecoraro v. Walls*, 286 F.3d 489, 443 (CA7 2002) (endorsing the Fifth Circuit's reasoning and noting that although "[t]he evidence obtained in such a hearing is quite likely to bear on the reasonableness of the state courts' adjudication . . . we do not see why it should alter the *standard* of federal review") (emphasis in original).

provisions—particularly §2254(d)(1)-(2). *See Mayes*, 210 F.3d, at 1289; *Barnett*, 174 F.3d, at 1135-36.

As none of the Tenth Circuit decisions offer a statutory construction contrary to that of the Fifth Circuit, Valdez identifies no conflict that warrants intervention by this Court. Valdez's petition, at most, implicates a shallow disagreement between the Fifth and Tenth Circuits. The Court should permit the issue to percolate in the lower courts and wait for a legitimate conflict to emerge before entertaining the tenuous argument that an inadequate state habeas hearing voids the AEDPA's statutory deference scheme.

Finally, Valdez alludes to circuit disagreement over a different AEDPA deference issue that was neither presented to, nor considered by, the Fifth Circuit—whether an "adjudication on the merits" entitled to deference under §2254(d) exists when a state court provides no rationale for its decision (*i.e.*, the opinion fails to identify the petitioner's federal claim or to discuss federal law). Pet. 15.[11] To the extent a conflict on that issue exists, it is irrelevant to Valdez's petition, which does not present that question.[12]

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11. To illustrate disagreement on this issue, Valdez cites *Sellan v. Kuhlman*, 261 F.3d 303 (CA2 2001), *Doan v. Brigano*, 237 F.3d 722 (CA6 2001), *Bell v. Jarvis*, 236 F.3d 149 (CA4 2000) (en banc), *cert. denied*, 122 S.Ct. 74 (2001), *Hameen v. Delaware*, 212 F.3d 226 (CA3 2000), *cert. denied*, 532 U.S. 924 (2001), and *Hennon v. Cooper*, 109 F.3d 330, 335 (CA7 1997). Valdez misrepresents the Sixth Circuit's decision in *Doan*. Pet. 15. Although that court declined to apply §2254(d)(1)'s "unreasonable application" prong to a state-court decision that did not identify a federal claim, the Sixth Circuit did afford deference under §2254(d)(1)'s "contrary to" prong. *Doan*, 237 F.3d, at 730-31.

12. In a footnote, Valdez remarks that evidentiary problems in the state habeas court rendered its rejection of his ineffective-assistance-of-

Because there is no circuit split on the actual AEDPA deference issue raised by Valdez and decided by the Fifth Circuit, the Court should deny the petition for writ of certiorari. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to review issues "neither raised before nor considered by the court of appeals").

III. THE FIFTH CIRCUIT CORRECTLY CONSTRUED THE AEDPA.

The Court also should deny the petition for certiorari because the Fifth Circuit's construction of the AEDPA's deference provisions is correct and consistent with this Court's AEDPA jurisprudence. As the Court explained in *Williams*, the AEDPA "placed a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus," 529 U.S., at 412, and the Act precludes a federal court from issuing the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*, at 411. The Fifth Circuit's holding accurately reflects the new deference standards created in the AEDPA and appropriately effectuates Congress's statutory vision for habeas reform.

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counsel claim not only unreasonable, but also something other than an "adjudication" entitled to deference. Pet. 22 n.8. However, Valdez does not—and could not—argue that the state court failed to provide any rationale for its decision. *See* Resp. App. 5a-7a. Nor is the issue of deference to summary state-court decisions a "question presented" in Valdez's petition. *See* Pet. i.

Specifically, the Fifth Circuit properly concluded that a full and fair state-court hearing is not a prerequisite for application of the AEDPA's deferential framework. Pet. App. 27, 32, 37. Certainly, the absence of an adequate state hearing may influence a federal court's decision to conduct a federal evidentiary hearing as a procedural safeguard. Pet. App. 20 n.17. But it does not alter the standards of review prescribed in 28 U.S.C. §2254(d) and (e)(1). *Id.*

The Fifth Circuit's reading of the AEDPA strikes an appropriate balance between fairness and comity. And it is supported not only by the Act's plain text, but also its alteration of pre-AEDPA deference standards.

Prior to the AEDPA amendments, the former 28 U.S.C. §2254(d) required that state-court factual findings—not legal conclusions or findings of mixed fact and law—be afforded a presumption of correctness unless a petitioner demonstrated one of several statutory exceptions, including the absence of a "full, fair, and adequate hearing in the State court proceeding." Pet. App. 15 (quoting former §2254(d)(6)). The Fifth Circuit correctly observed, however, that the AEDPA "jettisoned all references to a 'full and fair hearing' from the presumption of correctness accorded state court findings of fact" in favor of the "presumption of correctness erected in its place at §2254(e)(1)." Pet. App. 17. Consequently, to resurrect the "full and fair hearing" deference exception in former §2254(d) "would have the untenable result of rendering the amendments enacted by Congress a nullity." *Id.*

The Fifth Circuit's construction of the AEDPA does not "break new ground," as Valdez erroneously states. Pet. 11. To the contrary, the Fifth Circuit merely heeded this Court's admonition in *Williams* that the AEDPA's new constraints on habeas relief should not be interpreted in a manner that renders them "a nullity." 529 U.S., at 407; *see also id.* at 403-04. And that is precisely what would occur under Valdez's proposed reading of the statute—which

reinserts a full and fair hearing requirement that Congress clearly removed when it replaced former §2254(d)'s factual-deference standard with the new factual presumption of correctness in §2254(e)(1).

Additionally, Valdez's attempt to rewrite the AEDPA is untenable because it ignores the Act's creation of a new deference framework for questions of law and mixed questions of law and fact. These questions were not covered by former §2254(d) or its adequate-hearing requirement and, therefore, were subject to plenary federal review. *See Williams*, 529 U.S., at 400 (O'Connor, J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104, 112 (1985)); *cf. Wright v. West*, 505 U.S. 277, 287-94 (1992) (plurality). Now, however, the AEDPA expressly requires federal habeas courts to defer to state-court adjudications of legal and mixed questions that are "reasonable"—even if incorrect. *Williams*, 529 U.S., at 410-13 (discussing 28 U.S.C. §2254(d)(1) and highlighting that an "unreasonable application of federal law"—for which the writ may issue—"is different from an incorrect application of federal law"—for which the writ may not issue). No comparable deference requirement existed prior to the AEDPA, and certainly one was not reflected in former §2254(d).

Nonetheless, Valdez inexplicably argues that former §2254(d)'s adequate-hearing exception for *factual* deference should be not only resurrected but imported into the AEDPA's *legal* deference scheme currently codified in §2254(d)(1). This approach is illogical. Moreover, as the Fifth Circuit observed, "[t]he plain meaning of the text simply will not bear such a reading." Pet. App. 19.[13]

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13. Indeed, all of Valdez's statutory-construction arguments suffer from the same flaw: dependence on an implied-hearing prerequisite that lacks support in the AEDPA's plain text.

Finally, Valdez erroneously argues that the Fifth Circuit's refusal to graft an implicit adequate-hearing requirement onto the AEDPA's deferential framework deprives him of his right to a federal evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Fifth Circuit, however, did not hold that it was improper for the district court to conduct an evidentiary hearing. Nor did it order the district court to disregard any of the evidence it heard during that hearing.[14] Rather, the Fifth Circuit expressly stated that the district court, on remand, may use evidence from the hearing to facilitate its reevaluation of Valdez's ineffective-assistance-of-counsel claim under the correct AEDPA standards. Pet. 20-22 & n.17. That is the proper accommodation of *Townsend*'s principles within the AEDPA framework. *See Pecoraro v. Walls*, 286 F.3d 489, 443 (CA7 2002) (stating, in approving the Fifth Circuit's approach, that a federal evidentiary hearing may bear on the reasonableness analysis under §2254(d)(1), but "we do not see why it should alter the *standard* of federal review") (emphasis in original).

Because the Fifth Circuit's remand does not negate the district court's evidentiary record, Valdez's alleged right to a federal hearing under *Townsend* remains unaffected by the Fifth Circuit's decision.[15] And to the extent Valdez complains that the AEDPA

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14. The Fifth Circuit did, however, order the district court to consider several of Respondent Cockrell's exhibits that improperly were excluded at the hearing and "tend to undercut Valdez's assertion that he is mentally retarded." Pet. App. 35-37.

15. Valdez claims he was entitled to a federal evidentiary hearing under *Townsend* because the state habeas court denied him a full and fair hearing. The Fifth Circuit never determined, however, whether this deprivation actually occurred. Instead, it assumed, without deciding, that the state court did not provide a full and fair hearing. Pet. App. 9-10. Resolving this question was immaterial because the court held that a full

requires more deference to state habeas adjudications than previously afforded under *Townsend*, the AEDPA controls the federal disposition of Valdez's claim. *See Williams*, 529 U.S., at 402-03, 412-13 (applying heightened deference under the AEDPA to a habeas petition filed after the Act's effective date).

In holding that an adequate state-court hearing is not a prerequisite to the application of the AEDPA's deferential scheme, the Fifth Circuit reached a conclusion supported by both the statutory text and the Act's alteration of pre-AEDPA deference

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and fair hearing is not a prerequisite for the AEDPA's deference requirements. Pet. App. 27. Thus, Valdez's claims had to be remanded for reconsideration under §2254(d) and (e)(1). Pet. App. 37.

Even if the Fifth Circuit's statutory deference analysis is incorrect—which it is not—the remand was still appropriate because, as Respondent Cockrell argued in the Fifth Circuit, the state court afforded Valdez an adequate two-day hearing. Although Valdez claims the state court did not read the trial transcript or review missing hearing exhibits immediately prior to making its determination, those allegations do not render the two-day hearing a nullity. The state court afforded Valdez an adequate opportunity to present evidence on his ineffective assistance of counsel claim. That court heard testimony about, and admitted into evidence, the mitigation-related exhibits Valdez claims were lost post-hearing; permitted lengthy oral argument pertaining to the findings of fact and conclusions of law after the hearing; confirmed that it would reread the transcript of the two-day habeas hearing, at which all evidence relating to Valdez's ineffective-assistance-of-counsel claim was extensively discussed; made detailed findings and conclusions that—contrary to Valdez's characterization—differed materially from the State's proposed findings; and provided a detailed rationale for its decision. *See* Resp. App. 5a-7a. Because there was an adequate state-court hearing, the federal district court had no basis to disregard the AEDPA's deferential framework. The Court should deny the petition for writ of certiorari because the Fifth Circuit's remand was proper for that reason as well.

standards. Additionally, the Fifth Circuit's reading of the AEDPA is bolstered by the Seventh Circuit's decision in *Pecoraro*. 286 F.3d, at 443. It is also consistent with this Court's analysis in *Williams*, which emphasized the importance of effectuating the AEDPA's "new constraint" on federal habeas courts and Congress's new vision for habeas reform. *See* 529 U.S. at 403-04, 412-13. Because the Fifth Circuit correctly construed the AEDPA's deference requirements, this case does not warrant review.

IV. THE COURT SHOULD DECLINE TO REVIEW VALDEZ'S CONSTITUTIONAL CHALLENGES TO THE AEDPA, WHICH WERE NEVER PASSED UPON BY THE FIFTH CIRCUIT AND, REGARDLESS, ARE INCONSISTENT WITH THIS COURT'S AEDPA JURISPRUDENCE.

In the Fifth Circuit, Valdez argued for the first time in the final pages of his petition for rehearing en banc that the AEDPA would violate Article III, the Supremacy Clause, and the Sixth and Fourteenth Amendments if—as the Fifth Circuit held—an adequate state-court hearing is not a prerequisite for deference. Valdez could have made and developed these arguments in his briefing to the panel, since Respondent Cockrell's briefs advocated the construction of the AEDPA ultimately adopted by the Fifth Circuit. But Valdez did not. And, because the Fifth Circuit declined to rehear the case en banc, the court never addressed these issues. Accordingly, this Court should follow its practice of not considering constitutional questions that are not "pressed or passed upon below" and decline to entertain Valdez's challenges to the AEDPA. *Duigan v. United States*, 274 U.S. 195, 200 (1927); *see also, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Adickes*, 398 U.S., at 147 n.2.[16]

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16. Even assuming Valdez's petition for rehearing en banc sufficiently "pressed" these issues, they were never "passed upon" by the Fifth Circuit.

Regardless, Valdez's arguments do not warrant review because they lack merit. Valdez contends, for example, that the Fifth Circuit's reading of the AEDPA causes a "constitutional problem" under the Sixth Amendment because it "forces Valdez to show more than what *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] requires to establish an ineffective assistance of counsel claim." Pet. 28. But this Court recently confirmed that this is precisely what the AEDPA demands:

> "For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell v. Cone*, 122 S.Ct. 1843, 1852 (2002).

Rather, a federal court may issue the writ only if the state court's adjudication of a *Strickland* claim is unreasonable. *Id.*; *see also Williams*, 529 U.S., at 412-13.

Similarly, Valdez protests that the Fifth Circuit's construction of the AEDPA impermissibly conflicts with the Supremacy Clause because it forces federal courts to defer to state adjudications that are "erroneous." Pet. 30. This argument also is inconsistent with the Court's AEDPA precedent—under which the Fifth Circuit properly concluded that a federal court cannot substitute its judgment for that of a state court that adjudicates a federal question erroneously, but not unreasonably. *Williams*, 529 U.S., at 411; *see also Bell*, 122 S.Ct., at 1852.

Accordingly, even if Valdez's constitutional arguments are properly before the Court, no "constitutional problem" warrants review. Valdez has not raised an important and unsettled federal question that merits attention or requires reevaluation of the Court's AEDPA jurisprudence. *See* SUP. CT. R. 10(c).

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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August 19, 2002

CAUSE NO. 87-CR-1459-B
WRIT NO. 31,184-01

EX PARTE	)(	IN THE DISTRICT COURT
	)(	
	)(	OF NUECES COUNTY, TEXAS
	)(	
ALBERTO VALDEZ	)(	117TH JUDICIAL DISTRICT

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 28th day of February 1997, came on to be heard arguments on the parties' proposed findings of fact and conclusions of law in reference to the evidentiary hearing on Albert Valdez's Application for Post-Conviction Writ of Habeas Corpus and pursuant to the Court of Criminal Appeals's order dated June 26, 1996.

Came on November 26 and 27, 1990, and was conducted an evidentiary hearing on Applicant Alberto Valdez's Application for Post-Conviction Writ of Habeas Corpus, the Honorable Judge Joaquin Villareal sitting by special assignment.

Evidence was presented by the Applicant and by the State.

Presented by Applicant were: Carl Lewis, Ernestine Vasquez, Ms. Valeda Farmer, Olga Quintanilla, David Valdez, Mary Jane Barrientes, Shirley Lopez, Monica Lopez, Wayne Huff, Julio Garcia, Dr. Randy Price, Ms. Johnnie Grossman Bateman, Ms. Alexandra Banuelos, Ms. Jo Anna Banuelos, Dr. James Dyer, and Larry Bates.

Presented by the State were: Dr. Christopher Klaas and Ezekiel (Kiki) Rodriguez.

The hearing was recessed on November 27, 1990, to allow both parties to secure additional witnesses, if necessary. On September 24, 1996, on a motion by both parties, the evidence was closed.

The trial judge, accordingly, having all the evidence presented by the parties before him, makes the following findings:

1. Applicant was convicted of the offense of Capital Murder on May 16, 1988.

2. The Court of Criminal Appeals affirmed Applicant's conviction on May 24, 1989; his petition for writ of certiorari was denied on September 13, 1989.

3. On June 20, 1990, Applicant filed an application for post-conviction writ of habeas corpus raising the following twenty-four grounds of complaint.

I. Valdez was deprived of effective assistance of trial counsel in the sentencing phase in violation of the sixth and fourteenth amendments and Texas Law.

II. Trial Counsel's failure to investigate and present a complete case in mitigation violated the Eighth and Fourteenth Amendments by creating an unacceptable risk that Valdez was sentenced to death despite factors that called for a less severe penalty.

III. The second special issue of the Texas death penalty statute, as interpreted and applied by the Texas Court of Criminal Appeals, is unconstitutionally vague under the Eighth and Fourteenth Amendments.

IV. The admission of irrelevant unadjudicated extraneous offenses violated Valdez's right to a fair and reliable sentencing determination required by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Texas law.

V. The trial court violated the Eighth and Fourteenth Amendments by instructing the jury on parole and then precluding

the jury from considering relevant evidence regarding parole eligibility.

VI. The Texas death penalty statute and the punishment charge precluded the jury from considering or giving effect to mitigating evidence presented on behalf of Valdez in violation of the Eighth and Fourteenth Amendments.

VII. The Texas death penalty statute and its consistent interpretation by the Court of Criminal Appeals, as applied to this case, precluded the jury from considering or giving effect to available mitigating evidence in violation of the Eighth and Fourteenth Amendments.

VIII. The Texas death penalty statute, on its face and as applied in this case, provides inadequate guidance to the jury on the meaning of critical terms in the special issues in violation of the Fifth, Eighth, and Fourteenth Amendments and Texas law.

IX. The instructions given at the penalty phase misled the jury regarding the effect of a "no" vote by a single juror in violation of the Fifth, Eighth, and Fourteenth Amendments and Texas law.

X. The Texas death penalty statute, as construed by the Texas Court of Criminal Appeals, violates the Eighth and Fourteenth Amendment prohibitions against mandatory sentences for any class of capital murderers.

XI. The Texas death penalty statute violates the Eighth and Fourteenth Amendments by failing to give the jury an option of imposing a sentence of life without parole.

XII. The State failed to disclose material exculpatory and mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Texas law.

XIII. Valdez's death sentence was based upon an invalid conviction in violation of the Eighth and Fourteenth Amendments.

XIV. Valdez's death sentence was based upon invalid confessions in violation of the Eighth and Fourteenth Amendments.

XV. State's closing argument in the sentencing phase violated the Eighth and Fourteenth Amendments by focusing on the victim.

XVI. The introduction in evidence of six techniques used in disarming a police officer, without any showing that Valdez either knew or used such techniques, violated Valdez's rights to a reliable sentencing determination under the Eighth and Fourteenth Amendments by suggesting unfairly that he acted deliberately and is likely to be dangerous in the future.

XVII. The Texas court's admission of a gruesome, blood-soaked shirt worn by the victim inflamed the jury and violated the Eighth and Fourteenth Amendments.

XVIII. The trial court's denial of Valdez's Motion for Change of Venue violated his rights to a fair trial under the Fifth, Eighth, and Fourteenth Amendments and Texas law.

XIX. The trial court's denial of Valdez's Motion to Recuse violated Valdez's rights to a fair trial under the Fifth, Eighth, and Fourteenth Amendments and Texas law.

XX. The misconduct of the jury in considering evidence not properly admitted at trial violated Valdez's rights under the Sixth, Eight, and Fourteenth Amendments.

XXI. The trial court's failure to exclude for cause four jurors constitutionally unqualified to serve violated Valdez's Sixth and Fourteenth Amendment rights to a trial by an impartial jury.

XXII. The trial court's instructions at the punishment phase failed to inform the jury of the consequences of its "yes" answers to the special issue questions, and thus undermined its sense of

responsibility for the consequences of its verdict in violation of the Eighth and Fourteenth Amendments.

XXIII. It is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, to execute mentally retarded persons like Valdez.

XXIV. The totality of the trial court's constitutional errors in this case undermined the reliability of the jury's capital sentencing decision in violation of the Eighth and Fourteenth Amendments.

Relative to the above-listed allegations, the trial court makes the following specific findings of facts and conclusions of law.

I.

1. The standard for ineffective assistance of counsel is set forth in the following cases: Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) and Ex Parte Kunkle, 852 S.W.2d 499, 504-506 (Tex Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993).

2. Review of alleged ineffective assistance of counsel is whether, but for the unprofessional errors of counsel, there is a reasonable probability that the outcome of the case would have been different.

3. Trial counsel's performance is to be evaluated in light of the representation as a whole, as of the time of trial. See Kunkle, 852 S.W.2d at 504-505.

4. Carl Lewis's performance at applicant's trial cannot be judged in hindsight.

5. There is insufficient evidence to show that Applicant's trial counsel rendered ineffective assistance of counsel.

6. There is insufficient evidence to show that there is a reasonable probability that, but for the alleged unprofessional errors of counsel, applicant would not have been sentenced to death.

7. The case of Penry v. Lynaugh, 492 U.S. 302, 338-340, 109 S.Ct. 2934 (1989), was decided after applicant's case was tried.

8. There is insufficient evidence that Carl Lewis gave ineffective assistance of counsel in applicant's case.

9. It is common in the Corpus Christi, Nueces County, Texas area for Hispanic males to drop out of school.

10. The fact that applicant had dropped out of school did not put Carl Lewis on notice of any potential mental problem of applicant, if any.

11. Carl Lewis's decision not to investigate more thoroughly applicant's background was a decision based upon reasonable professional judgment at the time of the case.

12. Carl Lewis's failure to request the entire court jacket regarding applicant's burglary charge in Hockley County did not fall below the professional standard of conduct for defense attorneys.

13. There is insufficient evidence that counsel did not adequately investigate applicant's case.

14. The record as a whole shows that Carl Lewis interviewed and presented punishment witnesses on Applicant's behalf.

15. Mary Jane Barrientess, a witness presented on habeas corpus, was also a witness at the punishment phase of Applicant's trial.

16. Shirley Lopez, a witness presented on habeas corpus, was asked to testify by Carl Lewis, but she declined to testify on Applicant's behalf at the punishment phase of trial.

17. The testimony of the character witnesses presented on habeas corpus review was cumulative of testimony presented at trial on punishment.

18. Counsel was not ineffective in that there is no reasonable probability that, but for the evidence presented at the habeas corpus hearing, the outcome of sentencing would have been different.

19. Carl Lewis exercised reasonable and sound professional judgment in deciding which individuals to present as punishment witnesses.

20. The court finds that Applicant received effective assistance of counsel.

II.

1. Applicant's second complaint reiterates the claim under point I. Applicant attempts to apply the Eighth and Fourteenth Amendments, which prohibit governments from taking certain actions, to the alleged misdeeds of trial counsel. There is no evidence in the record for the proposition that trial counsel's actions created an "unacceptable risk".

III.

1. The issue presented by point three has already been settled in Texas law against Applicant in Jurek v. Texas, 428 U.S. 262, 275-277, 96 S.Ct. 2950 (1976), which upheld the Texas statutory scheme for submitting special issues to the jury in capital cases.

2. The following Texas cases control this issue, holding that terms such as "deliberately" need not be defined in the special capital punishment issues. Johnson v. State, 853 S.W.2d 527, 537 rehearing denied, cert. denied, 510 U.S. 852, 114 S. Ct. 154, (1993); Camacho v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 1339 (1994); Corwin v. State, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993), rehearing denied, cert. denied, 115 S.Ct. 95 (1994); Ex parte Kunkle, 852 S.W.2d 499, 507 (Tex. Crim. App. 1993).

3. The trial court did not err in failing to define specific terms in the special issues on punishment.

IV.

1. The issue of the admission of unadjudicated offenses at the punishment phase has been determined adversely to applicant. See Williams v. Lynaugh, 814 F.2d 205, 207 Cir. 1987), cert. denied, 108 S.Ct. 311 (1987); Smith v. State, 676 S.W.2d 379, 390 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1061, 105 S.Ct. 2173 (1985).

2. Any matter relevant to sentencing, including unadjudicated extraneous offenses, is admissible. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981 & Supp. 1997).

3. The trial court did not err or abuse its discretion in admitting unadjudicated extraneous offenses.

V.

1. There is no evidence that the jury considered parole laws in sentencing.

2. The punishment phase charge admonishing the jury not to consider parole in their deliberations did not constitute and impermissible "instruction on parole."

VI.

1. The question of whether a separate special issue is required in order to assure that effect is given to mitigating evidence has been determined in the following cases: Graham v. Collins, 113 S.Ct. 892, 897, 902-903 (1993) (requiring no special issue on mitigating factors such as acts of kindness, religious devotion, redeeming character traits, troubled family background), Richardson v. State, 879 S.W.2d 874, 884-885 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 741 (1995) (religious devotion, artistic talent are mitigation factors covered by the special issues), Ex parte Baldree, 810 S.W.2d 213, 216-217 (Tex. Crim. App. 1991) (evidence of non-violent past properly covered by statutory special issues).

2. The trial court followed the requirements of Texas law in its instructions to the jury on capital murder special issues.

3. The statutory special punishment issues provide appropriate constitutional means for the jury to consider and give effect to mitigating evidence.

4. The statutory special punishment issues submitted to Applicant's jury allowed Applicant's jury to consider and give effect to mitigating evidence.

VII.

1. The evidence of drug use, childhood hardship and abuse, creativity, artistic talent, and kindliness towards family was known and available to the applicant at the time of trial.

2. Evidence of kindness and family assistance was presented at punishment by the testimony of applicant's brother Daniel Valdez, Mary Jane Barrientes, Julie Saldana, and Maria Saldana.

3. The testimony of the character witnesses presented on habeas corpus review was cumulative of testimony presented at trial on punishment.

4. Applicant made no contemporaneous offer of proof of further evidence on childhood hardship, child abuse, creativity, artistic talent, and family and religious devotion at trial.

5. Under Ex Parte Kunkle, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993), Applicant was required to present mitigating evidence via a bill of exceptions in order for such evidence to be considered on habeas review.

6. Carl Lewis's failure to present more of this type of evidence was a decision of trial strategy which was sound and reasonable as judged at the time of trial.

7. Texas law at the time of trial required no separate special issue on mitigation evidence.

8. The mitigating evidence advanced by Applicant could be given effect by the special issues as forumulated under Texas law at that time, and which were submitted to Applicant's jury. Graham v. Collins, 113 S.Ct. 892, 901-902 (1993).

VIII.

1. The Court finds that the issue of definition of certain terms in the special punishment issues has already been resolved adversely to applicant under case law which has determined that the trial court is not required to define terms such as "deliberately," under Johnson v. State, 853 S.W.2d 527, 537 (Tex. Crim. App. 1992), rehearing denied, cert. denied, 510 U.S. 852, 114 S.Ct. 154, (1993), nor terms such as "criminal acts of violence," "probability," "society," "future dangerousness," under Camacho v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 1339 (1994); Corwin v. State, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993), rehearing denied, cert. denied, 115 S.Ct. 95 (1994).

2. The case of Ex Parte Kunkle, which held that the trial court correctly declined to define the terms contained in the statutory special issues of Art. 37.071, controls the issue and is adverse to applicant. Ex Parte Kunkle, 852 S.W.2d 499, 506-507 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993).

3. The United States Supreme Court approved of the Texas statutory scheme of special issues in Jurek v. Texas, 428 U.S. 262 (1976).

IX.

1. Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994), which held that the trial court did not err in failing to instruct the jury about the affect of a no vote by a single juror, controls this issue, and is adverse to applicant.

2. The instructions given the jury in this case at the punishment phase complied with those mandated by Texas law under art. 37.071 of the Texas Code of Criminal Procedure.

3. The Court finds that this issue has been determined adversely to Applicant in Jurek v. Texas, 428 U.S. 262, 275-277, 96 S.Ct. 2950 (1976), which upheld the Texas statutory scheme for special issues in capital cases.

4. There is no evidence that the jury was misled by the instructions given.

X.

1. The statutory scheme for punishment in Texas does not mandate a sentence for any class of capital murderers.

2. This issue has been decided against Applicant in Jurek v. Texas, 428 U.S. 262 (1976) and Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994).

XI.

1. The instructions given the jury at the punishment phase in this case complied with those mandated by Texas law under art. 37.017 of the Texas Code of Criminal Procedure.

2. This issue has been decided against Applicant in Arnold v. State, 873 S.W.2d 27, 39-40 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994).

3. The point presents no fact issue to be determined, as the availability of a life-without-parole sentence option is a question for the Legislature. A judicial mandate for such a sentence would violate the separation of powers doctrine.

XII.

1. There is no evidence that Applicant did not receive information requested and listed as "complete" by the trial court on the discovery motions.

2. There is no evidence that a member of the prosecution team had actual possession, control of, or knowledge of, any exculpatory or

mitigating evidence which it failed to produce as required by Brady v. Maryland, 393 U.S. 83, 83 S.Ct. 1194 (1963).

3. The court finds that knowledge of psychological testing and evaluations was known to the applicant, and no duty inured to the State to produce such evidence under Havard v. State, 800 S.W.2d 195, 204-205 (Tex. Crim. App. 1989).

XIII.

1. There is no evidence that any of applicant's prior convictions were void.

2. Applicant's point is an attack on the trial court's decision to admit evidence of the federal conviction, and as such, is a question of trial error.

3. There is no evidence that the trial court abused its discretion in admitting such evidence.

XIV.

1. The Court finds that the claim of invalid confessions is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. This is not a proper ground for a writ of habeas corpus, as applicant's sentence was not based on an invalid confession.

4. There is no evidence that trial court abused its discretion in denying applicant's motion to suppress.

XV.

1. The allegation of improper closing argument is not a proper ground for a writ of habeas corpus. Alleged impropriety in arguments is an issue which should be raised on direct appeal, but was not raised in this case. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. The Court finds that the argument on Bock's feelings at death does not constitute a "victim impact statement."

3. Assuming without deciding that prosecutorial argument focused on the victim, the Court finds that the opinions in South Carolina v. Gathers, 490 U.S. and Booth v. Maryland, 482 U.S. 496 (1987), have been overruled by Payne v. Tennessee, 111 S. Ct. 2597, 2604-2611 (1991), which now allows victim impact evidence in capital sentencing.

XVI.

1. The Court finds that the claim of error in the admission of demonstrative evidence on weapons disarming techniques was determined adversely on direct appeal in Valdez v. State, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989), cert. denied, 495 U.S. 963 (1989). As such, this is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. Applicant is not entitled to relitigate direct appeal issues on habeas corpus. See generally Ex Parte Drake, 883 S.W.2d 213 (Tex. Crim. App. 1994).

3. There is no evidence that the trial court abused its discretion in allowing the demonstrated techniques.

XVII.

1. The claim of trial error in the admission of the bloody police shirt was determined adversely on direct appeal in Valdez v. State, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989). As such, this is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. Applicant is not entitled to relitigate matters already addressed on appeal. See generally Ex Parte Drake, 883 S.W.2d 213 (Tex. Crim. App. 1994).

3. There is no evidence that the trial court abused its discretion in allowing evidence of the bloody shirt.

XVIII.

1. A complaint about the denial of the Motion to Transfer Venue is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550

S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. Denial of a motion to change venue is reversible only upon a showing of abuse of discretion. Hathorn v. State, 848 S.W.2d 101, 109 (Tex. Crim. App. 1992), cert. denied, 113 S.Ct. 3062 (1993).

4. There is no evidence that the trial court abused its discretion in denying the motion to change venue.

XIX.

1. The denial of a motion to recuse is not properly cognizable on habeas corpus review. This claim is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. There is no evidence that the trial court was biased against applicant.

4. There is no evidence that the trial court abused its discretion in denying applicant's motion to recuse.

XX.

1. There is no evidence that juror Bateman in fact viewed the actual crime scene.

2. There is no evidence that juror Bateman discussed any of her field observations with the others on the jury.

3. There is no evidence that the jury received any outside evidence.

4. There is no evidence of any juror misconduct.

5. There is no evidence the jury's verdict was influenced by any extrinsic evidence.

6. Applicant could not have suffered any harm due to the fact that the jury did not receive any outside information.

XXI.

1. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. There is no evidence that the trial court erred or abused its discretion in failing to grant applicant's challenges for cause.

XXII.

1. The trial court followed the mandates of Texas law in its instruction.

2. The claim that the trial court should be required to instruct jurors on the effect of "yes" answers to special issues has been substantially decided against Applicant in Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992), rehearing denied, cert. denied 507 U.S. 1035, 113 S. Ct. 1858; (see also Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994), which held that the trial court did not err in failing to instruct the jury about the affect of a no vote by a single juror).

XXIII.

1. Pursuant to Penry v. Lynaugh, 492 U.S. 302, 338-340, 109 S.Ct. 2934 (1989), the Court finds, without deciding the issue of Valdez's mental retardation, if any, that the execution of mentally retarded

individuals does not per se violate the Eighth and Fourteenth Amendments.

2. The fate of mentally retarded individuals with regard to capital punishment is an issue for legislative determination, as a strict mandate by the Courts would violate the separation of powers doctrine.

XXIV.

1. This is not a proper ground for a writ of habeas corpus, as it is vague, conclusory, and constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

The Court accordingly finds that there is no need for any further evidentiary hearing.

The Court finds that the assertions contained in the application for writ have not been proven by the applicant, and are without merit. Having found the that the petition is without merit and should be denied, the Court recommends that the relief requested in the petition be, in all respects, denied.

/s/ Joaquin Villarreal
Joaquin Villarreal
JUDGE PRESIDING

CAUSE NO. 87-CR-1459-B
WRIT NO. 31,184-01

EX PARTE	)(	IN THE DISTRICT COURT
	)(	
	)(	OF NUECES COUNTY, TEXAS
	)(	
ALBERTO VALDEZ	)(	117TH JUDICIAL DISTRICT

ORDER

1. The court directs the clerk of this court to file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

2. The clerk of this court is ordered to send a copy of this Memorandum and Order to the petitioner and to the appellate section of the District Attorney's office.

SIGNED AND ORDERED ENTERED this 31st day of March, 1996.

/s/ Joaquin Villarreal
Joaquin Villarreal
JUDGE PRESIDING

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE ALBERTO VALDEZ

WRIT NO. 31, 184-01

Habeas Corpus Application from **NUECES** County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Art. 11.07, V.A.C.C.P.

On May 13, 1998, applicant was convicted of the offense of capital murder. After the jury returned affirmative answers to the special issues submitted under Art. 37.071, V.A.C.C.P., punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Valdez v. State, 776 S.W.2d 162 (Tex.Cr.App. 1989).

In the instant cause, applicant presents twenty-four allegations in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing. Ultimately, the trial court entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are supported by the record, and upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 13th DAY OF ~~JULY~~ AUGUST, 1997.

PER CURIAM

En banc
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